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IN THE

Supreme Court of the United States

October Term, 1960

No. 921

LEAVELL & PONDER, INC., and MORGAN COMPANY, INC.

Petitioners,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' BRIEF IN REPLY TO BRIEF IN OPPOSITION

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ATTORNEYS FOR PETITIONERS

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In reply to the brief in opposition to Petition for Writ of Certiorari, Petitioners respectfully show the Court:

I.

In its brief in opposition, page 10, the Government takes the position that the Third Reason offered by Petitioners for granting the Writ "is not properly before the Court". The point involved was the error of the Court of Appeals in holding that the cost of the project at the date it was built, 1950, is proof of value even though the cost of reproduction of the project at the date it was condemned, 1958, is not proof of value.

The Government takes the position that this point is not properly before this Court for three reasons: (1) "the commission did not rely on original cost". This, however, is immaterial. Whether or not original cost has heretofore been taken as a measure of value in this Wherry case or any other Wherry case, it must now be taken so in Courts in the Fifth Circuit, because the Court of Appeals has held such original cost *is* a measure of value of the property. This holding was recognized and conceded to be error in the brief filed by the Government on the appeal of this case to the Court of Appeals (page 62), because the Court of Appeals had already eliminated reproduction cost as a measure of value, in the *Benning* case. (*United States v. Benning Housing*, 276 F.2d 248.) Now the Court of Appeals has created an erroneous rule of evidence on value in Wherry cases by reiterating this ruling in this case, and the Government acts as if this were not still error by confining the point to a footnote on its page 10.

Then, (2) the Government says this point is not properly before the Court because "no appeal was taken by the United States on this issue". Again, the Government does not deny that the Court of Appeals fell into error; instead, it merely says the issue is not before this Court. Of course, Petitioners may complain of errors that justify the granting of a Writ, whether the Government took its appeal from the Trial Court on such issues or not. Petitioners are not limited to the issues assigned by the Government in the Trial Court, but may show this Court the errors in the opinion of the Court of Appeals. The ruling on the use of original cost is an error, as the Government recognized following the *Benning* opinion.

Then further, (3) the Government says the point is not before this Court because the statements of the Court of Appeals "are dictum". Clearly, that Court's holding on this issue is nothing of the kind. That Court's holding (page A-24 of Petition; page 1119 of Record) clearly instructs that in a retrial of this case, or the future trial of any Wherry case, reproduction cost not be shown, but "proof must be of three kinds", including "the cost of the project—a single total figure easily testified to before a jury". Thus, that Court clearly held

that the fact finders must receive and consider "the cost of the project" as proof of value, though reproduction cost must not be received. In so holding the Court of Appeals departed from standard rules of evidence on valuation, and set an erroneous rule for Wherry cases.

This issue is before the Court and needs correction. The Government's brief in opposition had to assert that this issue was not one of the questions presented (page 2) and not properly before the Court (page 10), because it was unable to argue that the ruling was anything but error.

II.

It is beside the point whether the order that this case be tried by a jury was "the basis of the reversal" of the case, as the Government argues (page 7). When the Court of Appeals held that it "would not consider it necessary to reverse the judgment solely because of the submission of this case to commissioners" (page A-22, Petition), it implied that the Trial Court had not abused his discretion in the reference to commissioners. Nevertheless, on reversing the case, it took away the Trial Court's discretion by holding that the reference "was error" (page A-22). Such destruction of the Trial Court's discretion in this case effectively destroys a Trial Court's discretion in any case under Rule 71-A, for if a Trial Court has no discretion to refer such a property as this to a commission, he has none at all. The Court of Appeals' ruling is contrary to Rule 71-A and to the legislative expression in 42 U.S.C.A. 1594c(1).

III.

The Court of Appeals' view of the evidence on valuation, contrary to the Government's argument (page 10), does present "a question which warrants further review by this Court", for the reason that the holding of the Court of Appeals is wrong, as a reading of the lengthy record would reveal.

Wherefore, Petitioners pray that their Petition for Writ of Certiorari be granted.

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CERTIFICATION

Eugene T. Edwards, one of Counsel, hereby certifies that the foregoing Brief in reply to the brief in opposition to the Petition for Writ of Certiorari has been furnished to Counsel for the United States by the mailing of three copies of same to Messrs. Roger P. Marquis and A. Donald Mileur, Appellate Division, Department of Justice, Washington 25, D.C., and to Hon. Archibald Cox, Solicitor General, Department of Justice, Washington 25, D.C., with first class postage on May 31, 1961.

Eugene T. Edwards